other cases. Sprint stated this was a prohibited collateral attack and urged the Commission to decline the attempts of MICPA and KPA to expand the issues under investigation. STCG indicated that the scope of the docket should not be expanded as MICPA and KPA had requested. SWBT stated that the Commission should limit the issues to those stated in the Motion to Open Docket and that any attempts to expand the issue by MICPA and KPA should be denied. GTE indicated it was inappropriate to address the issues KPA and MICPA had raised as they were not within the scope of the docket.

KPA also filed additional comments May 19 indicating that it was in agreement with the comments submitted by MICPA. KPA stated that it disagreed with all other parties on the position that the issues raised in the Staff's Straw Proposal should be the only issues addressed.

Staff submitted responsive comments on May 19. Staff stated it felt the docket should be limited in scope to the issues stated in the Order Establishing Case issued by the Commission on December 9, 1997. Staff stated that based on the comments filed, the majority of the parties supported Staff's position and that the only three parties in disagreement were OPC, MICPA, and KPA.

In response to MICPA, Staff indicated that the issues raised by MICPA had previously been addressed by the Commission in various other dockets and were not presently before the Commission.

In response to KPA's comments, Staff stated that it did not believe the present docket should be used to revisit issues already decided by the Commission and that the issues raised by KPA fit into this category. Staff also stated that many of the issues KPA brought up were not caused by Commission rules or regulations, and that this was not the

type of entry or exit barrier that was to be investigated. Staff stated, in conclusion, that the issues raised by KPA were not appropriate for this docket.

On June 2, MICPA and KPA filed a joint motion to expand the issues under investigation, seeking to expand the investigation to cover all of the issues raised in their comments. SWBT, Sprint and STCG all filed replies to this motion stating their opposition to expansion of the investigation. SWBT stated that the motion's attempt to add additional issues to the investigation was the same action attempted by KPA and MICPA previously, which had been rejected by the Commission.

On June 12, Staff filed its opposition to KPA and MICPA's motion to expand the issues under investigation. In addition, on June 10 the participants filed a motion for submission of the case stating that the submission of the case was only related to the issues addressed in Staff's Straw Proposal and not those issues raised in MICPA and KPA's motion. Staff stated the participants requested Commission review of participants' filed comments and a Commission determination based on that information. Staff indicated the participants also requested the Commission cancel the scheduled evidentiary hearing.

On June 16, the Commission issued an Order Denying Motion to Expand Issues Under Investigation and Amend Procedural Schedule and Granting Request to Submit Case on the Record Presented. The Commission reiterated its determination that the investigation was specifically opened to address whether or not the Commission's rules and regulations contained barriers to free entry to and exit from the competitive payphone market, and to address the issue of PIPs in Missouri. The Commission indicated that the additional issues raised by KPA and MICPA

were not related to either Commission rules or regulations or the PIP program, and therefore the motion to expand issues was denied. The Commission also determined the comments filed by the participants were an adequate statement of the various participants' positions and the issues under investigation would be decided based on those comments.

Position of the Parties

The Commission opened this docket on December 9, 1997, to investigate the following issues: (1) whether the Commission's rules and regulations contain barriers which might impact an independent payphone service provider or local exchange company's (LEC's) ability to freely enter or exit the competitive payphone market; and (2) whether the Commission should adopt provisions which provide for payphones in areas not served by the normal operation of a competitive market, commonly referred to as public interest payphones (PIPs). The Commission will discuss below the issues presented, addressing the existence of possible entry and exit barriers separately.

A. Are there any entry barriers to the payphone market caused by Commission rules or regulations?

Staff indicated that after reviewing the Commission's rules and regulations on payphones it had been unable to identify any entry barriers to the payphone market. Staff stated that, since the payphone application process had been streamlined and opened up to any interested parties, there were no longer any entry barriers to the payphone market.

GTE, the Mid-Missouri Group, CompTel-Mo, AT&T, Sprint, and SWBT all indicated they agreed with Staff's position on entry barriers. MICPA and KPA had attempted to raise various other alleged entry barriers.

This attempt was rejected by the Commission as none of the alleged barriers were related to Commission rules or regulations.

OPC stated that further investigation into possible entry barriers caused by the Commission's rules and regulations was necessary and that this investigation should also propose methods and steps to remove these barriers. OPC stated a thorough examination of the barriers and solutions to remedy them was necessary before the Commission could make a ruling.

B. Are there any exit barriers to the payphone market caused by Commission rules or regulations?

Staff indicated following its investigation, that it found only one existing exit barrier. Staff stated that 4 CSR 240-32.070(4) functioned as an exit barrier since it required telecommunications providers to maintain at least one payphone available to the public, 24 hours per day in each exchange in which the telecommunications company operated. Staff indicated the existing rule provided no compensation for maintaining this payphone and clearly constituted an exit barrier. Staff recommended this subsection of the regulation be rescinded in its entirety. Staff stated that without this section of the regulation, many existing payphones might disappear but that "this is the effect that competition should have." Staff indicated that if maintaining the payphone was economically feasible, the competitive marketplace would provide that it be maintained.

AT&T, CompTel-Mo, the Mid-Missouri Group, STCG, and Sprint all agreed with Staff's position on exit barriers. SWBT stated it supported rescinding 4 CSR 240-32.070(4) and classified it as an exit barrier. GTE also supported rescinding 4 CSR 240-32.070(4). MICPA indicated it

generally agreed with Staff's analysis regarding exit barriers from the payphone market.

KPA indicated it had no objection to Staff's proposed elimination of 4 CSR 240-32.070(4). KPA had again attempted to raise various other alleged exit barriers. This attempt was rejected by the Commission as none of the alleged barriers were related to Commission rules or regulations.

OPC indicated that rescinding 4 CSR 240-32.070(4) would remove any customer protection from potential failure in the payphone market, and therefore the regulation should be maintained since it was in the public interest. OPC stated that further investigation into the exit barriers caused by the Commission's rules and regulations was necessary and that this investigation should also propose methods and steps to remove these barriers. OPC stated a thorough examination of the barriers and solutions to remedy them was necessary before the Commission could make a ruling.

C. Is there presently a need for a Pubic Interest Payphone (PIP) program in Missouri?

Staff indicated that to qualify as a PIP according to the FCC, a payphone would need to meet the following requirements: (1) It must fulfill a public policy objective in health, safety, or welfare; (2) it is not provided by a location provider with an existing contract; and (3) it would not otherwise exist as a result of the operation of the competitive marketplace. Staff recommended that the Commission not establish a PIP program in Missouri as this was arguably a social program and would be difficult to administer. Staff indicated if the Commission felt further investigation was necessary in this area, the Commission should open a separate docket that had as its sole purpose an investiga-

tion of the need for PIPs. Staff stated that the competitive payphone market should be expected to adjust and accommodate the varying needs in the payphone market and that the market should be given an opportunity to meet the needs of the public prior to the institution of a PIP program.

Staff indicated OPC advocated a more thorough investigation of the need for PIPs in Missouri but did not provide any evidence to demonstrate that the competitive marketplace would fail at ensuring the existence of payphones that serve the public policy interests of health, safety, and welfare. Staff stated that, since the emerging competitive payphone market was still in its infancy all parties would essentially have to rely on speculation in assessing the future needs and concerns in the payphone market. Staff also indicated that deregulation of the payphone market and assurance of fair compensation for all completed calls would likely cause an increase in the number of payphones available to the public and not the decrease OPC envisioned.

MICPA, AT&T, CompTel-Mo, and the Mid-Missouri Group all stated they agreed with Staff's approach regarding the establishment of a PIP program in Missouri.

SWBT indicated there was no reason to set up a PIP program before there is a demonstrable need and that the competitive marketplace would be the best tool to provide for PIPs. SWBT stated that the payphone market is an extremely competitive one; therefore payphone providers had an incentive to place payphones. SWBT indicated that, following the introduction of competition to the payphone market the number of payphones available to the general public had increased.

GTE stated it agreed with Staff's position that the competitive payphone market should be given an opportunity to meet the public's need for payphones prior to a PIP program being established by the Commission. GTE indicated that, by allowing the competitive marketplace to work the Commission could then later determine where payphones did not exist and where there was a public need for those payphones. GTE also expressed concerns over how a PIP program would be funded and stated that, if at a later time the Commission revisited the PIP issue, an explicit funding program should be established that reimburses payphone service providers for the costs incurred in establishing and providing service to PIP locations.

Sprint stated that until the competitive marketplace had an opportunity to operate and adjust it could not be determined whether PIPs were needed to address a legitimate public health, safety, and welfare concern, or whether that concern was being left unmet.

STCG stated the requirement that there be a payphone in each exchange found in 4 CSR 240-32.070(4) could not be considered a PIP program under the FCC guidelines, as it was not funded "fairly and equitably." STCG indicated that requiring LECs to continue to provide a payphone in each exchange with no means of funding an often unprofitable service did not comply with the FCC guidelines regarding PIPs. STCG stated that until there had been a trial by competition a determination of whether or not PIPs were needed could not be made. STCG also stated that if OPC believed PIPs were really necessary OPC should offer some proposal for consideration that meets the FCC guidelines rather than merely suggesting that the current requirement regarding one payphone per exchange be retained.

OPC indicated further investigation into the current state mechanisms that ensure the provision of PIPs was needed. OPC stated that, although the FCC had not mandated a national PIP program, the FCC had indicated a need to ensure the maintenance of payphones that serve the public policy interests of health, safety, and welfare in locations where they would not otherwise be provided as a result of the operation of the market.

OPC indicated 4 CSR 240-32.070(4) offered the solution to the provision of PIPs in Missouri and that rescinding this section of the regulation should not occur unless the Commission established some alternative mechanism to ensure the existence of PIPs in Missouri. OPC indicated that there was no evidence that Missouri's current requirement that LECs maintain at least one payphone in each exchange in which they operate was an inappropriate means of providing PIPs.

OPC indicated a review of the PIP program would need to include an examination of the need for public payphones, whether such a need had been or would be provided by the market, and if not, what mechanisms should be adopted to provide for such a need. OPC indicated this investigation would need to evaluate whether specific payphones would disappear in a competitive marketplace and whether those phones were needed for the public policy objectives of health, safety, or welfare. OPC stated that the mere fact that this evaluation would be "difficult" did not justify not making an effort. OPC indicated a final step in the investigation of the PIP issue involved a determination of an appropriate mechanism to provide PIPs and also a determination of what would be the appropriate funding mechanism for PIPs.

OPC stated Staff's Straw Proposal did not adequately address the PIP issue. OPC indicated further investigation into the current mechanisms and proposed alternatives for providing PIPs was necessary, and until that was accomplished, OPC could not agree with Staff's conclusion that a PIP program would be "cumbersome, expensive, and inefficient to operate." OPC indicated further evidence needed to be presented by the parties regarding whether or not any current payphones satisfied the FCC's definition of a PIP.

KPA recommended the Commission establish PIP guidelines, as there is currently a need for PIPs. KPA indicated the Missouri Universal Service Fund or some other funding source should be implemented to support these phones.

Discussion

The Missouri Public Service Commission wishes to thank all the participants for their efforts in addressing the issues presented. The comments of the participants were helpful in reaching the determinations stated below.

The Commission finds that there are presently no entry barriers to the competitive payphone market.

The Commission finds that a potential exit barrier to the competitive payphone market was sufficiently identified by the participants. The majority of the participants felt 4 CSR 240-32.070(4) qualifies as an exit barrier and should be rescinded. The Commission shall take the necessary steps to begin the rule-making process needed to review that rule.

IT IS THEREFORE ORDERED:

1. That the investigation of payphone issues conducted by the Missouri Public Service Commission pursuant to the Telecommunications Act of 1996 is concluded.

2. That this order shall become effective on October 20, 1998.

3. That this case may be closed on October 21, 1998.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Drainer,
and Murray, CC., concur.
Schemenauer, C., absent.

Harper, Regulatory Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 4th day of February, 2003.

Tari Christ, d/b/a ANJ Communications, *et al.*,	)	
	)	
Complainants,	)	
	)	
v.	)	**Case No. TC-2003-0066**
	)	
Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company; Sprint Missouri, Inc., d/b/a Sprint; and GTE Midwest Incorporated, d/b/a Verizon Midwest,	)	
	)	
Respondents.	)	

ORDER DENYING REHEARING AND DENYING COMPLAINANTS' ALTERNATIVE MOTION FOR LEAVE TO AMEND

Procedural History and Summary of the Positions of the Parties:

On August 22, 2002, some 25 payphone providers[1] filed their complaint against Southwestern Bell Telephone Company, L.P., doing business as Southwestern Bell Telephone Company, Sprint Missouri, Inc., doing business as Sprint, and GTE Midwest

[1] The several Petitioners shall be collectively referred to as the Complainants or the Payphone Providers. The Petitioners are Tari Christ, d/b/a ANJ Communications; Bev Coleman, an Individual; Commercial Communications Services, L.L.C.; Community Payphones, Inc.; Coyote Call, Inc.; William J. Crews, d/b/a Bell-Tone Enterprises; Illinois Payphone Systems, Inc.; Jerry Myers, d/b/a Jerry Myers Phone Co.; John Ryan, an Individual; JOLTRAN Communications Corp.; Bob Lindeman, d/b/a Lindeman Communications; Monica T. Herman, d/b/a M L Phones; Midwest Communications Solutions, Inc.; Mark B. Langworthy, d/b/a Midwest Telephone; Missouri Public Pay Phone Corp.; Missouri Telephone & Telegraph, Inc.; Pay Phone Concepts, Inc.; Toni M. Tolley, d/b/a Payphones of America North; Jerry Perry, an Individual; PhoneTel Technologies, Inc.; Sunset Enterprises, Inc.; Teletrust, Inc.; Tel Pro, Inc.; Vision Communications, Incorporated; and Gale Wachsnicht, d/b/a Wavelength, LTD.

Incorporated, doing business as Verizon Midwest. Each of the Respondents filed a motion to dismiss and, on January 9, 2003, the Commission sustained these motions and dismissed the complaint. In its order, the Commission considered only a few of the arguments made by the parties because the Commission considered these few issues to be both fundamental and dispositive. The Commission did not intend that any inference be drawn regarding the arguments that it did not discuss in its order.

The Commission dismissed the complaint because it failed to meet the minimum pleading requirements of the statutes under which it was brought. Those statutes were found, upon close reading of the complaint, to be Section 386.390.1 and Section 392.400.6.[2] The Commission concluded that the latter provision does not authorize the Commission to hear a complaint as to the matters raised by Complainants. The Commission concluded that the former provision imposes certain technical pleading requirements that the Complainants did not meet. These are, first, that at least twenty-five customers and prospective customers must join in a complaint as to the reasonableness of the rates charged by a utility; and, second, where the rates in question have been approved by the prior order of the Commission, that an intervening change in circumstances must be pleaded to avoid the bar on collateral attacks imposed by Section 386.550.

On January 16, Complainants timely filed their Application for Rehearing and Contingent Motion for Leave to File Amended Complaint. Complainants first argue that the Commission erred by improperly subjecting their complaint to technical rules of pleading. Complainants contend that their complaint is sufficient given the pleading standard properly applicable to complaints brought before this agency. Second, Complainants argue that

---

[2] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

Section 386.550 does not apply in the circumstances surrounding their complaint. When read in conjunction with Section 386.270, Complainants contend that Section 386.390.1 authorizes complaints challenging the reasonableness of rates regardless of the fact that the Commission approved those rates in a prior order. Third, Complainants argue that the Commission erroneously interpreted and applied Section 392.400.6. Complainants point to a prior decision of this Commission in which the Commission applied that statute in a manner favorable to Complainants' viewpoint.

On January 17, the Office of the Public Counsel filed its Motion for Rehearing. Public Counsel seeks rehearing because it believes that the Commission erred in its Order of January 9 with respect to the pleading requirements applicable to complaints brought under Section 386.390.1. Public Counsel argues that, while Section 386.550 bars collateral attacks on Commission orders, it must not be read to bar challenges before the Commission on the reasonableness of utility rates. The Commission's reading, Public Counsel suggests, creates "an obstacle to challenging rates" in that it might require the challenger to conduct "a special audit and investigation prior to filing an overearnings complaint or a complaint that alleges that the [sic] mistake or error was made and the rates are unlawful or unjust[.]"

On January 27, each of the three Respondents filed a response in opposition to Complainants' application. Not surprisingly, each Respondent expresses the view that rehearing should be denied because the Commission correctly analyzed Sections 386.390.1, 386.550 and 392.400.6 and dismissed the complaint. Bell goes on to argue that Complainants' contingent motion for leave to amend the complaint should be denied because Section 386.270 bars retroactive relief and Section 392.245 – the Price Cap Statute -- bars prospective relief. If no relief is available, Bell suggests, amending the

complaint would be pointless. Sprint's response raises arguments originally made in its motion to dismiss and its reply to Complainants' response to that motion: that the New Services Test does not apply to Sprint because it is not a Bell Operating Company; that the relief sought by Complainants constitutes impermissible retroactive ratemaking; and that the Commission is without authority to award pecuniary relief in the form of damages, reparations or a refund. Verizon simply reasserts the arguments it raised in its motion to dismiss and its reply to Complainants' response by quoting the Commission's summary of those arguments from the Order of January 9.

The Requests for Rehearing:

The Commission is authorized to grant an application for rehearing "if in its judgment sufficient reason therefor be made to appear[.]"[3] "Sufficient reason" includes a significant mistake of law or fact by the Commission or a public policy argument not previously considered. Complainants and Public Counsel have not met this standard and their requests for rehearing will be denied. However, the Commission will provide further explanation of the conclusions reached in its Order of January 9.

Overly Analytical Application of Technical Rules of Pleading

Complainants assert that the Commission's Order of January 9 is in error because it applied technical rules of pleading to the complaint and, based upon this "over analysis," dismissed that pleading. Public Counsel joins in Complainants' view, stating its concern "that the order applies technical rules of pleading to the complaint contrary to its own conclusion of law that the application of technical rules of pleading should not defeat a

[3] Section 386.500.1.

complaint if it presents some matter that falls within the PSC's jurisdiction." It is true that, in an early case, the Missouri Supreme Court stated that "a complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient."[4] The Commission itself cited this rule in its Order of January 9 when setting out the standards by which the pending motions to dismiss were to be determined. However, the sense of the Court's direction is best understood by considering the context in which the Court made that statement.

In the *Kansas City Terminal* Railway case, the Court was considering an assertion that the Commission had overstepped its authority and acted as a judicial body by construing and enforcing a contract.[5] The Court noted that the allegations contained in the complaint in that case, as well as much of the evidence received, supported the charge.[6] The Court made the statement in question as it dismissed the significance of these observations, noting that "we are not so much concerned with the form and substance of the complaint as with the nature and extent of the order made and the considerations upon which it was based."[7]

Unlike the situation in *Kansas City Terminal Railway,* the complaint that is the subject of the present dispute was challenged by motions attacking its legal sufficiency. Consequently, the Commission was required to closely scrutinize it under the applicable

---

[4] *St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,* 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

[5] 308 Mo. at 371-72, 272 S.W. at 960.

[6] 308 Mo. at 372, 272 S.W. at 960.

[7] *Id.* The Court went on to set aside the Commission's order because it concluded that the Commission had, in fact, exceeded its jurisdiction by construing and enforcing a contract.

pleadings rules. The rule of *Kansas City Terminal Railway* does not stand for the proposition that complaints filed with this Commission need not meet any pleading requirements nor that they are immune from dismissal for insufficiency. Rather, the case means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading. The Eastern District of the Missouri Court of Appeals has said the same thing:

> On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.[8]

However, a different standard applies where, as here, a statute or controlling judicial decision imposes a specific pleading requirement on an administrative complaint. Strict compliance is required with such specific and jurisdictional pleading requirements.[9]

As discussed in the Order of January 9, the Commission's special complaint authority in Section 386.390.1 is expressly conditioned upon the joining of at least 25 customers or prospective customers as complainants. This requirement, by the unambiguous terms of the statute, is jurisdictional. Complainants here contend that the Commission applied this rule too strictly in dismissing their complaint. They state "Complainants may not be customers of each of the respondents, but are prospective

---

[8] *Sorbello v. City of Maplewood,* 610 S.W.2d 375, 376 (Mo. App., E.D. 1980); *Schrewe v. Sanders,* 498 S.W.2d 775, 777 (Mo. 1973); *and see Giessow v. Litz,* 558 S.W.2d 742, 749 (Mo. App.1977).

[9] *Abrams v. Ohio Pacific Exp.,* 819 S.W.2d 338, 342 (Mo. banc 1991) (time limitations); *Farmer v. Barlow Truck Lines, Inc.,* 1998 WL 418740, *4 (Mo. App., W.D. 1998) (procedure for review of awards).

customers and would be customers if the rates were lawfully and reasonably set and charged." The Commission cannot agree.

A prospective customer is one that is presently ready and able to buy the service in question. Therefore, an entity not presently certificated to provide payphone services in Missouri cannot be a prospective customer of network services intended for such providers. Any other construction would defeat the legislative purpose of the restriction because any entity could be said to be a prospective customer.[10] The Commission has consistently taken this position in the past. Complainants have not shown sufficient reason for rehearing on this issue.

Section 386.390.1

The Public Counsel joins Complainants in seeking rehearing with respect to the Commission's analysis of Section 386.390.1 in conjunction with Section 386.550. The Commission believes that the Public Counsel's concerns are unnecessary in that it has done nothing to obstruct those who wish to challenge utility rates.

In its Order of January 9, the Commission explained that Section 386.390.1 contains two distinct complaint authorities, a general complaint authority and a special complaint authority limited to the reasonableness of rates. The Commission applied the bar against collateral attacks imposed by Section 386.550 to actions brought under both the general complaint authority and the special complaint authority of Section 386.390.1. In its request for rehearing, Public Counsel argues that Section 386.270 acts to exclude actions brought under the special complaint authority from the bar of Section 386.550.

---

[10] *Boone County v. County Employees Retirement Fund,* 26 S.W.3d 257, 261 (Mo. App., W.D. 2000) (purpose of statutory construction is to determine the intent of the legislature from the words used in the statute and to give effect to that intent).

Section 386.270 provides:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Certainly, Section 386.270 contemplates proceedings before the Commission intended to challenge the reasonableness of rates. As discussed in the Commission's Order of January 9, Section 386.390.1 specifically authorizes such proceedings. However, certain conditions must be met for that authority to attach. One of them is the perfection requirement that at least 25 customers or prospective customers join in the complaint. Another is the bar against collateral attacks imposed by Section 386.550.

Contrary to Public Counsel's reasoning, the Commission must conclude that Section 386.270 does not act to exempt the special complaint authority in Section 386.390.1 from the effects of Section 386.550. This conclusion is mandated by the *Licata* decision relied upon by the Commission in its Order of January 9. In *Licata,* the court held that Section 386.550 barred a proceeding before the Commission that challenged a Commission-approved tariff provision as unconstitutional.[11] The tariff provision in question was a regulation and not a rate and the case was therefore brought under the general complaint authority of Section 386.390.1 rather than the special complaint authority. However, the language of Section 386.270 expressly applies both to regulations and to rates. Therefore, *Licata* must be understood to show that Section 386.550 applies to both the general and the special complaint authorities contained in Section 386.390.1. In reaching this conclusion, the Commission is not creating obstacles

---

[11] *St. ex rel. Licata v. PSC,* 829 S.W.2d 515, 519 (Mo. App., W.D. 1992).

for those who desire to challenge utility rates. Rather, the Commission is simply following the binding guidance of the Missouri Court of Appeals.

A consideration of the relationship of the general and special complaint authorities contained in Section 386.390.1 reinforces this conclusion. The latter is actually stated in the statute as a limitation on the former rather than as a separate and distinct complaint authority. In other words, Section 386.390.1 authorizes the Commission to hear and determine complaints involving utilities; however, if the complaint goes to the reasonableness of rates, then certain extra restrictions apply. The unmistakable purpose of the legislature was to restrict such proceedings, not to facilitate them. In this scheme, there is absolutely no reason to conclude that a restriction applicable to the general complaint authority is not also applicable to the special complaint authority regarding rates.

The legislature has made a public policy determination that utilities be insulated to a certain degree from rate challenges. The policy benefits all ratepayers, who must after all reimburse the utility through rates for the costs incurred in defending against meritless actions. The legislative policy is implemented by the restrictions imposed on such actions by the statutory scheme. Contrary to Public Counsel's contention, the restriction herein at issue is found in the statutes: it is found in Section 386.550.

The *Ozark Border* case, also cited by the Commission in its Order of January 9, explains how the requirement of Section 386.550 may be satisfied.[12] The complaint need simply contain an allegation of a substantial change in circumstances.[13] This is not a heavy burden for a pleader to meet. In the case of an earnings investigation, for example,

---

[12] *St. ex rel. Ozark Border Electric Cooperative v. PSC,* 924 S.W.2d 597, 600-601 (Mo. App., W.D. 1996).
[13] *Id.*

a complaint might be sufficient that did no more than plead the passage of time since the Commission's last rate order and the occurrence of intervening economic fluctuations.

Public Counsel also argues that the Commission erred in its Order of January 9 by stating that the bar of Section 386.550 applies to all persons, whether or not they were parties or in privity with parties to the prior proceeding. Public Counsel invokes the equitable principle of collateral estoppel, asserting that the Commission misapplied *Licata* "since that case noted the [sic] privity is necessary for the application of collateral estoppel."

Section 386.550 states:

> In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.

The language of this statute does not condition its application upon whether or not the litigant was a party to the prior proceeding or in privity with such a party. In *Licata,* the litigant had not been a party nor the privy of a party to the prior litigation.[14] Contrary to Public Counsel's assertion, *Licata* makes no mention of either collateral estoppel or privity. In any event, Section 386.550 is not a court-made rule of issue preclusion but a statutory bar that the Commission must respect.

For these reasons, the Commission concludes that sufficient cause for rehearing has not been shown as to this issue.

Section 392.400.6

Complainants argue that the Commission has previously recognized that Section 392.400.6 authorizes a single telecommunications company to bring a complaint against another.[15] Complainants rely on a case more than ten years old in which the

---

[14] 829 S.W.2d at 518.

[15] *AT&T Communications of the Southwest, Inc. v. GTE North, Inc.,* 29 Mo.P.S.C. (N.S.) 591 (May 19, 1989).

Commission permitted one telecommunications company to challenge the reasonableness of the rates of another. The Commission's prior decisions do not have precedential effect, although the Commission does seek consistency in order to provide reliable guidance.[16] The case relied on by Complainants contains no discussion or analysis of Section 386.400.6 and a rereading of it does not persuade the Commission that its analysis of that statute in the Order of January 9 is wrong. Therefore, the requests for rehearing are denied as to that issue.

The Contingent Motion for Leave to Amend:

Complainants request leave, in the event that the Commission denies their Application for Rehearing, to amend their complaint. Respondents all oppose this request on the basis of various arguments not discussed by the Commission in its Order of January 9.

The decision whether to allow a party to amend a pleading is a matter within the sound discretion of the tribunal.[17] In making this decision, the tribunal should consider (1) hardship to the moving party if leave to amend is not granted; (2) the reasons for failure to include any necessary new matter in earlier pleadings; (3) the timeliness of the application; (4) whether the amendment could cure the inadequacy of the moving party's pleading; and (5) the injustice resulting to the party opposing the motion should it be granted.[18]

---

[16] *St. ex rel. Interstate Transit Lines v. Public Service Commission,* 234 Mo. App. 554, ___, 132 S.W.2d 1082, 1087 (1939); *and see City of Columbia v. Mo. St. Bd. of Mediation,* 605 S.W.2d 192, 195 (Mo. App., W.D. 1980) (doctrine of *stare decisis* does not apply to administrative tribunals).

[17] *Manzer v. Sanchez,* 985 S.W.2d 936, 939 (Mo. App., E.D. 1999); *Curnutt v. Scott Melvin Transport, Inc.,* 903 S.W.2d 184, 193 (Mo. App., W.D. 1995).

[18] *Id.*

In the present case, no particular hardship is imposed on Complainants by dismissal. They can simply file a new complaint. However, so far as matters presently stand, the present Complainants are unable to satisfactorily amend the complaint. New complainants will necessarily have to join in the complaint in order to meet the perfection requirement of Section 386.390.1. Whether or not such additional parties will ever be found is unknown. Because the parties presently before the Commission are unable to repair the complaint, Respondents are entitled to its dismissal.

For these reasons, the Commission will not grant the contingent motion.

IT IS THEREFORE ORDERED:

1. That the Application for Rehearing filed by Tari Christ, doing business as ANJ Communications, and others, on January 16, 2003, is denied.

2. That the Motion for Rehearing filed by the Office of the Public Counsel on January 17, 2003, is denied.

3. That the Contingent Motion for Leave to File Amended Complaint filed by Tari Christ, doing business as ANJ Communications, and others, on January 16, 2003, is denied.

4. That this order shall become effective on February 4, 2003.

5. That this case may be closed on February 5, 2003.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Simmons, Ch., Murray, Lumpe,
and Forbis, CC., concur.
Gaw, C., concurs, with concurring
opinion attached.

Thompson, Deputy Chief Regulatory Law Judge

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Tari Christ, d/b/a ANJ Communications, et al.	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	Case No. TC-2005-0067
	)	
Southwestern Bell Telephone Company, L.P., d/b/a Southwestern Bell Telephone Company,	)	
	)	
Respondent.	)	

AT&T MISSOURI'S
MOTION TO DISMISS, ANSWER, AFFIRMATIE DEFENSES
AND OPPOSITION TO REQUEST FOR WAIVER

AT&T Missouri,[1] pursuant to Commission Rule 4 CSR 240-2.070, respectfully submits its Motion to Dismiss, Answer, Affirmative Defenses and Opposition to Complainants'[2] Request for Waiver.

INTRODUCTION

The Missouri Public Service Commission should reject Complainants' third attempt to collaterally attack AT&T Missouri's payphone tariffs -- now 16 years after they were thoroughly examined and approved by the Commission. As the Commission found, and the Cole County Circuit Court affirmed, the claims Complainants are raising now are the same claims they raised

[1] Pursuant to the Commission's *Order Allowing Reversion to Previous Corporate Status*, issued June 26, 2007, in Case No. TO-2002-185, Southwestern Bell Telephone, L.P. reverted to its prior form as a Missouri corporation, with its prior name, Southwestern Bell Telephone Company. It now does business under and will be referred to in this pleading as "AT&T Missouri."

[2] Complainants Tari Christ, d/b/a ANJ Communications; Bev Coleman, an Individual; Commercial Communications Services, L.L.C.; Community Payphones, Inc.; Com-Tech Resources, Inc. g d/b/a Com-Tech Systems; Coyote Call, Inc.; William J. Crews, d/b/a Bell-Tone Enterprises; Davidson Telecom LLC; Evercom Systems, Inc.; Harold B. Flora, d/b/a American Telephone Service; Illinois Payphone Systems, Inc.; JOLTRAN Communications Corp.; Bob Lindeman, d/b/a Lindeman Communications; John Mabe, an Individual; Midwest Communications Solutions, Inc.; Missouri Telephone & Telegraph, Inc.; Jerry Myers, an Individual; Pay Phone Concepts, Inc.; Jerry Perry, an Individual; PhoneTel Technologies, Inc.; Craig D. Rash, an Individual; Sunset Enterprises, Inc.; Telaleasing Enterprises, Inc.; Teletrust, Inc.; Tel Pro, Inc.; Toni M. Tolley, d/b/a Payphones of America North; Tom Tucker, d/b/a Herschel's Coin Communications Company; HKH Management Services, Inc. will be referred to in this pleading as "Complainants."

and the Commission rejected in 1997 when AT&T Missouri filed its revised tariffs for Semi-Public Telephone Service and Customer-Owned Pay Telephone Service to reflect changes required to deregulate pay telephone service as required by the Federal Communications Commission ("FCC"):

> The Commission's 1997 orders approving the tariffs were determinations on the merits. In them, the Commission found that SWBT, Sprint and Verizon's tariffs complied with federal law. Those orders are long-since final and the Relators' Complaint was a collateral attack. The Complaint did not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of Licata, the Commission lawfully concluded that Section 386.550 barred the Commission from reconsidering the lawfulness of the tariffs.[3]

Had Complainants wished to contest the Commission's determinations, they had the right to seek review under the procedures specifically set out by statute. But they elected not to do so. Having failed to exercise their right to seek review within the statutory timeframes, they should not now, 16 years later, be permitted to collaterally attack the Commission's prior Order and AT&T Missouri's lawfully-approved tariff.

The Complaint is also subject to dismissal on numerous other grounds: Complainants have failed to perfect their complaint by complying with the requirements of Section 386.390(1) RSMo., which the Commission has no authority to waive; the rates are not in excess of the maximum allowable rates which AT&T Missouri was permitted to charge under the price cap statute, and the Commission is without authority to require a reduction in a rate which complies with the statutory regime; AT&T Missouri is now a competitively classified company pursuant to Sections 392.245.6 and .7 and the Commission has no jurisdiction over the level of AT&T Missouri's rates; Complainants' claim for retroactive refunds is barred by the filed rate doctrine and the prohibition against retroactive ratemaking; and as AT&T Missouri has not provided

[3] *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court, November 5, 2003).

payphone service since at least 2010, 47 U.S.C. §276 no longer applies to AT&T Missouri, rendering the Commission without authority to adjudicate the Complaint under federal law.

MOTION TO DISMISS

For its Motion to Dismiss, pursuant to Commission Rule 4 CSR 240-2.070(7), AT&T Missouri states:

1. The Filed Rate Doctrine Bars this Complaint. Complainants have failed to state a claim upon which relief may be granted, in that the specific rates of AT&T Missouri alleged by Complainants to be unlawful and excessive were in fact, at all pertinent times, the lawful rates approved by, and on file with, this Commission, and thereby presumed to be lawful, just and reasonable pursuant to Missouri law and the filed rate doctrine. Accordingly, Complainants cannot recover retroactive refunds based on some alleged right to a rate different from the filed tariff rate.

Section 386.270 RSMo. provides:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

In Missouri, the law is well settled that a tariff that has been approved by the Commission "becomes Missouri law and has the same force and effect as a statute enacted by the legislature."[4] Articulating this long-standing doctrine, the Missouri Supreme Court ruled that a tariff schedule of rates and charges filed and published in accordance with the public utility law:

> . . . acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the

[4] *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App. 1997).

> commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce Act . . and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies . . . If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.[5]

As AT&T Missouri's tariff rates acquired the force and effect of law when the Commission approved them, the Complaint must be dismissed.

2. The Retroactive Ratemaking Prohibition Bars Claims for Retroactive Refunds. Complainants have failed to state a claim upon which relief may be granted in that their claim for retroactive refunds is barred by the prohibition against retroactive ratemaking.

For their relief, Complainants seek a refund "in the amount of the difference between the rates approved by the Commission under the New Services Test, and the rates charged by AT&T Missouri to the Complainants since April 15, 1997" plus interest.[6] As the Commission is aware (and as set out above), the rates at issue here were approved by the Commission in its April 11, 1997 Order in Case No. TT-97-345. There, the Commission specifically found that those rates complied with the directives of the FCC and were just and reasonable.[7]

Even if the Commission were to now find that those rates should be adjusted (which AT&T Missouri denies), it is barred by law from doing so on a retroactive basis. Under the well-established prohibition against retroactive ratemaking, the Commission may not re-determine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his or her property without due process. In a case involving a fuel adjustment clause ("FAC"), the Missouri Supreme Court explained this well-established principle:

---

[5] *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n of Missouri*, 315 Mo. 312, 317, 286 S.W. 84, 86 (1926) (internal citations omitted).
[6] *See*, Complaint, p. 16.
[7] *Order Approving Tariff Revisions*, pp. 10-11.

> Public Counsel requested in oral argument that we remand to the commission for a determination by it of the excess amounts collected by the utilities under the FAC over that which they would have collected under a just and reasonable rate, which would include rate increases properly authorized, and to order a refund of any such excess.
>
> However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, Section 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, see, *State ex. rel. General Telephone Co. of the Midwest v. Public Service Comm'n*, 537 S.W.2d 655 (Mo. App. 1976). It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process. See, *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co.*, 284 US 370, 389-90, 76L.Ed. 348, 52 S.Ct. 183 (1932); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 31, 70 L.Ed. 808, 46 S.Ct. 363 (1926); *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).[8]

Thus, to the extent the Complaint seeks retroactive refunds of amounts paid under a previously approved Commission tariff, it should be dismissed.

3. The Law of the Case, Res Judicata, and Collateral Estoppel Bar this Complaint, as Does State Law. Complainants' challenge to AT&T Missouri's approved tariffs constitutes an impermissible collateral attack on the Commission's prior order approving those tariffs and should be dismissed.[9] Section 386.550 RSMo states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In

[8] *State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission*, 585 S.W.2d 41, 58 (Mo. 1979).

[9] *See, State ex rel. Licata, Inc. v. Public Service Com'n of State* (App.1992) 829 S.W.2d 515.

addition to that statutory bar, the Complainants' challenge is prohibited by the law of the case doctrine[10] and the doctrines of res judicata and collateral estoppel.[11]

Here, Complainants' claims have already been specifically considered and rejected by the Commission on three separate occasions. The issues being raised here by Complainants are the same issues that they, as members of the Midwest Independent Coin Payphone Association ("MICPA"), raised in Case No. TT-97-345 and which were rejected by the Commission in its April 11, 1997 Order Regarding Deregulation of Payphones. In that case, AT&T Missouri had filed revised tariffs for semi-public telephone service and customer-owned payphone telephone service to comply with the FCC's requirements to deregulate pay telephone service. In approving the tariffs, the Commission stated:

> The Commission has thoroughly reviewed the many filings in this case, including the Motions to Suspend filed by MCI and MICPA and finds that SWBT's proposed tariff revisions are in compliance with the FCC's Orders, and should therefore be approved as amended.[12] Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary.

The Commission also found that "while MICPA questions whether SWBT is pricing its services at cost-based rates, SWBT has supplied to the Staff supporting cost information which the Staff believes to be sufficient justification for SWBT's proposed rates."[13] As a result, the Commission found that "no intrastate rate reductions are necessary in conjunction with SWBT's subsidy

---

[10] *Czapla v. Czapla*, 94 S.W.3d 426, 428 (Mo. App. E.D. 2003) ("former adjudication is conclusive not only as to all questions raised directly and passed upon, but also as to matters which arose prior to the first appeal and which might have been raised thereon but were not"); *accord, Walihan v. St. Louis-Clayton Orthopedic Group, Inc.*, 891 S.W.2d 545, 547 (Mo. App. E.D. 1995).

[11] *State ex rel. Licata, Inc. v. Pub. Serv. Comm;*, 829 S.W.2d 515, 518 (Mo. App. W.D. 1992).

[12] *In the Matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff, PSC Mo. No. 35, Regarding Deregulated Pay Telephone Service*, Case No. 97-345, Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order and Denying as Moot Discovery Requests, issued April 11, 1997, at p. 10 (*"Order Approving Tariff Revisions"*).

[13] *Id.*, p. 8.

calculation, and finds that the rates proposed by SWBT for its payphone services are just and reasonable."[14]

This is not the first time that Complainants, through MICPA, have attempted to resurrect issues previously addressed in Case No. TT-97-345. In Case No. TW-98-207, which the Commission established in compliance with an FCC mandate,[15] MICPA also alleged that AT&T Missouri's payphone service tariffs failed to meet the New Services Test. In opposing their attempt to inject previously-resolved issues into the Commission's investigation in Case No. TW-98-207, AT&T Missouri explained that it had provided a copy of the New Services Test referenced in the FCC's Orders to Staff in support of the rates AT&T Missouri included in its tariff filing in Case No. TT-97-345 concerning the deregulation of payphone service. AT&T Missouri complied with the FCC's New Services Test requirement by providing the required analysis to Commission Staff for each payphone service offered. After reviewing the new services test and other cost information, Staff stated and the Commission found that AT&T Missouri had supplied sufficient justification, including satisfaction of the New Services Test, for AT&T Missouri's proposed tariffs to be approved. In a June 16, 1998 Order, the Commission rejected the attempt to broaden the investigation and reopen these issues.[16]

Complainants tried again in 2002 through the complaint they filed in Case No. TC-2003-0066. There, the Commission found -- and the Cole County Circuit Court affirmed -- that the

---

[14] *Id.*

[15] In a September 20, 1996 Order and a November 8, 1996 Order on Reconsideration, the FCC in CC Docket No. 96-128, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, directed state commissions to investigate (1) whether the Commission rules and regulations contained barriers to free entry and exit from the competitive payphone market; and (2) to address the issue of provisioning and funding of "public interest" payphones. See, Order Establishing Case, Case No. TW-98-207, *In the Matter of an Investigation of Payphone Issues Pursuant to the Telecommunications Act of 1996*, issued December 9, 1997 at p. 1.

[16] *See, In the Matter of an Investigation of Payphone Issues Pursuant to the Telecommunications Act of 1996*, Case No. TW-98-207, Order Denying Motion to Expand Issues Under Investigation and Amend Procedural Schedule and Granting Request to Submit Case on the Record Presented, issued June 16, 1998, at p. 2.

claims Complainants raised were the same as those they raised and the Commission rejected in 1997. The Court, affirming the Commission's dismissal of the complaint, stated:

> The Commission's 1997 orders approving the tariffs were determinations on the merits. In them, the Commission found that SWBT, Sprint and Verizon's tariffs complied with federal law. Those orders are long-since final and the Relators' Complaint was a collateral attack. The Complaint did not include any allegation of substantially changed circumstances. Therefore, pursuant too the rule of Licata, the Commission lawfully concluded that Section 386.550 barred the Commission from reconsidering the lawfulness of the tariffs.[17]

As the Commission previously examined AT&T Missouri's payphone tariff rates and found them just and reasonable, the current Complaint is nothing more than an impermissible collateral attack --albeit 16 years later -- on the Commission's order approving those rates. Here, Complainants raise nothing beyond what they either have or could have raised in their prior complaints. Accordingly, the Complaint should be dismissed.

4. The Complaints Have Failed to Perfect the Complaint. Complainants have also failed to state a claim upon which relief may be granted in that they have failed to perfect their complaint by complying with the requirements of Section 386.390(1) RSMo., which the Commission has no authority to waive.

Section 386.390(1), RSMo (2000) requires the complaint to be signed by not fewer than 25 consumers or purchasers or prospective consumers or purchasers of telephone service:

> Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint

[17] *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court November 5, 2003).

shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service. (emphasis added).

Commission Rule 4 CSR 240-2.070(4) contains a similar requirement:

(4) Formal Complaints. A formal complaint may be made by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any person, corporation, or public utility, including any rule or charge established or fixed by or for any person, corporation, or public utility, in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission. The formal complaint shall contain the following information:

(A) The name and street address of each complainant and, if different, the address where the subject utility service was rendered;

(B) The signature, telephone number, facsimile number, and email address of each complainant or their legal representative, where applicable;

(C) The name and address of the person, corporation, or public utility against whom the complaint is being filed;

(D) The nature of the complaint and the complainant's interest in the complaint, in a clear and concise manner;

(E) The relief requested;

(F) A statement as to whether the complainant has directly contacted the person, corporation, or public utility about which complaint is being made;

(G) The jurisdiction of the commission over the subject matter of the complaint; and

(H) If the complainant is an association, other than an incorporated association or other entity created by statute, a list of all its members.

(5) No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any public utility unless the complaint is signed by the public counsel, the mayor or the president or chairman of the board of alderman or a majority of the council or other legislative body of any town, village, county or other political subdivision, within which the alleged violation occurred, or not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of public utility gas, electricity, sewer or telephone service as provided by law. Any public utility has

> the right to file a formal complaint on any of the grounds upon which complaint are allowed to be filed by other persons and the same procedure shall be followed as in other cases.

As the complaint itself shows, not one of the Complainants have signed it, much less the required 25. Complainants seek to get around this requirement by asking the Commission to waive it. The Commission, however, has no authority to waive this statutory requirement, as it is jurisdictional. In dismissing Complainants' nearly identical prior complaint in Case No. TC-2003-0066 for failure to join the necessary 25 customers or prospective customers as complainants, the Commission held strict compliance with the statute was required:

> . . . here, a statute or controlling judicial decision imposes a specific pleading requirement on an administrative complaint. Strict compliance is required with such specific and jurisdictional pleading requirements.[18] As discussed in the Order of January 9, the Commission's special complaint authority in Section 386.390.1 is expressly conditioned upon the joining of at least 25 customers or prospective customers as complainants. This requirement, by the unambiguous terms of the statute, is jurisdictional.[19]

Complainants have had 16 years to sign the complaint, and no basis exists for excusing this jurisdictional requirement.

Moreover, Complainants do not meet the numerical requirement in Section 386.390(1), RSMo (2000) and 4 CSR 240-2.070(5) for "not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of . . . telephone service." To the best of AT&T Missouri's knowledge, information and belief:

- Only four Complainants are customers of AT&T Missouri's payphone tariff;

---

[18] *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 342 (Mo. banc 1991) (time limitations); *Farmer v. Barlow Truck Lines, Inc.*, 1998 WL 418740, *4 (Mo. App., W.D. 1998) (procedure for review of awards).

[19] *Tari Christ, d/b/a ANJ Communications, et al., v. Southwestern Bell Telephone Company, L.P., et al.*, Case No. TC-2003-0066, *Order Denying Rehearing and Denying Complaintants' Alternative Motion for Leave to Amend,* issued February 4, 2003, p. 6.

- At most, only 13 Complainants are certificated by the Commission to provide pay telephone service (3 of which are only maintaining their certificates in order to pursue this complaint); and

- Nine of the corporate Complainants have been administratively dissolved.

Without the requisite authority to lawfully conduct business and to provide public telecommunications service in Missouri, the Commission has made clear that a claimant cannot constitute a prospective purchaser or prospective consumer as contemplated by Section 386.390(1) or 4 CSR 240-2.070(3):

> Of those potential purchasers, it is clear to the Commission that one, possibly two, of them are not yet certificated to provide telecommunications services within the State of Missouri and therefore they could not be potential purchasers of SWBT's switched access service within Missouri.
>
> . . .
>
> A telecommunications business which has neither sought nor received the necessary authority to conduct business in Missouri could not constitute a prospective purchaser or prospective consumer as contemplated by Section 386.390.1. Therefore, one, possibly two, of the Complainants cannot be considered to be consumers or purchasers or prospective consumers or purchasers for purposes of this statute.[20]

Accordingly, the Complaint does not meet the prerequisites for bringing a complaint as set forth in Section 386.390.1 and 4 CSR 240-2.070(3) and should be dismissed.

5. The Price Cap Statute Bars this Complaint. Complainants have failed to state a claim upon which relief may be granted because their Complaint is barred by the Missouri price cap statute. Section 392.245 RSMo (2000) authorizes the Commission to employ price cap

[20] *MCI Telecommunications Corporation, Inc., et al. v. Southwestern Bell Telephone Company*, Case No. TC-97-303, Report and Order, issued September 16, 1997 at pp. 14, 15-16.

regulation to ensure just, reasonable and lawful rates[21] and subparagraph 2 of that section makes price cap regulation mandatory once the statutory criteria for such regulation has been met:

> A large incumbent local exchange company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent companies service area. (emphasis added).

As the Commission is aware, an alternative local exchange telecommunications company (Dial U.S.) began providing alternative local service in January 1997 in Springfield, Missouri, thus subjecting AT&T Missouri to price cap regulation in accordance with the statute. Pursuant to Section 392.245(3),[22] AT&T Missouri's maximum allowable rates are those which were in effect on December 31, 1996. Any rate equal to or less than the rates in effect on December 31, 1996, are deemed just and reasonable as a matter of law under Section 392.245. As the rates at issue in this proceeding are not in excess of the maximum allowable rates which AT&T Missouri was permitted to charge under price cap regulation, the Commission is without authority to require a reduction in those rates as they comply with the statutory regime.

AT&T Missouri has since become a competitively classified company under Section 392.245(7). As a result, the Commission has no jurisdiction over the level of AT&T Missouri's rates:

---

[21] Section 392.245(1) states:

> The commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation. As used in this chapter, **"price cap regulation"** shall mean establishment of maximum allowable prices for telecommunications services offered by an incumbent local exchange telecommunications company, which maximum allowable prices shall not be subject to increase except as otherwise provided in this section. (emphasis added, bold in original).

[22] Section 392.245(3) states:

> Except as otherwise provided in this section, the maximum allowable prices established for a company under subsection 1 of this section shall be those in effect on December 31 of the year preceding the year in which the company is first subject to regulation under this section. Tariffs authorized under subsection 9 of this section shall be phased in as provided under such tariffs as approved by the Commission.

> If the services of an incumbent local exchange telecommunications company are classified as competitive under this subsection, the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate in its competitive environment, upon filing tariffs which shall become effective within the time lines identified in section 392.500.

Since AT&T Missouri's rates were not in excess of the maximum allowable rates the price cap statute permitted it to charge, and AT&T Missouri is now a competitively classified company, the Commission has no jurisdiction to require any change in rates. Accordingly, the Complaint should be dismissed.

6. The Commission has no Jurisdiction under 47 U.S.C. §276.

Complainants base their claim on 47 U.S.C. §276, which states:

> SECTION 276. [47 U.S.C. 276] PROVISION OF PAYPHONE SERVICE.
> (a) NONDISCRIMINATION SAFEGUARDS.- After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service –
> (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and
> (2) shall not prefer or discriminate in favor of its payphone service.

AT&T Missouri, however, has not provided payphone service since at least 2010. 47 U.S.C. §276 therefore no longer applies to AT&T Missouri, rendering the Commission without authority to adjudicate the Complaint under federal law

ANSWER

For its Answer, AT&T Missouri states:

Nature of Complaint[23]

AT&T Missouri denies all allegations contained in the narrative "Nature of the Complaint."

[23] For ease of reference, AT&T Missouri's Answer will follow the headings, and in the section titled "Parties" the numbering, used within Complainants' Complaint.

The Parties

1. AT&T Missouri denies that Complainant Tari Christ, d/b/a ANJ Communications (ANJ), is authorized to provide private pay telephone service in Missouri.

2. AT&T Missouri denies that Complainant Bev Coleman is authorized to provide private pay telephone service in Missouri.

3. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 3 of the Complaint concerning Complainant Commercial Communications Services, L.L.C.

4. AT&T Missouri denies that Complainant Community Payphones, Inc. (ComPay) is a Missouri corporation in good standing and that it is authorized to provide private pay telephone service in Missouri.

5. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 5 of the Complaint that Com-Tech Resources, Inc., d/b/a Com-Tech Systems (Com-Tech), is a Texas corporation in good standing. AT&T Missouri denies that Com-Tech Resources, Inc., d/b/a Com-Tech Systems (Com-Tech), is a corporation in good standing in Missouri and that it is authorized to provide private pay telephone service in Missouri.

6. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 6 of the Complaint that Coyote Call, Inc. is a Kansas corporation in good standing. AT&T Missouri denies that Coyote Call, Inc. is a corporation in good standing in Missouri. AT&T Missouri is without sufficient information to admit or deny the allegation that Coyote Call, Inc. is authorized to provide private pay telephone service in Missouri.

7. AT&T Missouri denies that Complainant William J. Crews, d/b/a Bell-Tone Enterprises, is authorized to provide private pay telephone service in Missouri.

8. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 8 of the Complaint concerning Complainant Davidson Telecom, LLC (DTLLC).

9. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 9 of the Complaint concerning Complainant Evercom Systems, Inc. (Evercom).

10. AT&T Missouri denies that Complainant Harold B. Flora, d/b/a Amnerican Telephone Service, is authorized to provide private pay telephone service in Missouri.

11. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 11 of the Complaint concerning Complainant Illinois Payphone Systems, Inc. (IPS).

12. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 12 of the Complaint concerning Complainant JOLTRAN Communications Corp. (JOLTRAN).

13. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 13 of the Complaint concerning Complainant Bob Lindeman, d/b/a Lindeman Communications.

14. AT&T Missouri denies that Complainant John Mabe is authorized to provide private pay telephone service in Missouri.

15. AT&T Missouri denies that Midwest Communication Solutions, Inc. (MCSI) is a Missouri corporation in good standing. AT&T Missouri is without sufficient information to

admit or deny the allegations that Midwest Communication Solutions, Inc. (MCSI) is authorized to provide private pay telephone service in Missouri.

16. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 16 of the Complaint concerning Complainant Missouri Telephone & Telegraph, Inc.

17. AT&T Missouri denies that Complainant Jerry Myers is authorized to provide private pay telephone service in Missouri.

18. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 18 of the Complaint that Pay Phone Concepts, Inc. (PPC) is a Kansas corporation in good standing. AT&T Missouri denies that Pay Phone Concepts, Inc. (PPC) is a corporation in good standing in Missouri and that it is authorized to provide private pay telephone service in Missouri.

19. AT&T Missouri denies that Complainant Jerry Perry is authorized to provide private pay telephone service in Missouri.

20. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 20 of the Complaint that PhoneTel Technologies, Inc. (PhoneTel) is an Ohio corporation in good standing. AT&T Missouri denies PhoneTel Technologies, Inc. (PhoneTel) is a corporation in good standing in Missouri and that it is authorized to provide private pay telephone service in Missouri.

21. AT&T Missouri denies that Complainant Craig D. Rash is authorized to provide private pay telephone service in Missouri.

22. AT&T Missouri denies that Complainant Sunset Enterprises, Inc. (Sunset) is a Missouri corporation in good standing and that it is authorized to provide private pay telephone service in Missouri.

23. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 23 of the Complaint that Telaleasing Enterprises, Inc. (TEI) is an Illinois corporation in good standing. AT&T Missouri denies Telaleasing Enterprises, Inc. (TEI) is a corporation in good standing in Missouri and that it is authorized to provide private pay telephone service in Missouri.

24. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 24 of the Complaint that Teletrust, Inc. is a Texas corporation in good standing. AT&T Missouri denies that Complainant Teletrust, Inc. is corporation in good standing in Missouri. AT&T Missouri is without sufficient information to admit or deny the allegation that Teletrust, Inc. is authorized to provide private pay telephone service in Missouri.

25. AT&T Missouri denies that Complainant Tel Pro, Inc. (TelPro) is a Missouri corporation in good standing and that it is authorized to provide private pay telephone service in Missouri.

26. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 26 of the Complaint that Complainant Toni M. Tolley, d/b/a Payphones of America North, is authorized to provide private pay telephone service in Missouri.

27. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 27 of the Complaint that Complainant Tom Tucker, d/b/a Herschel's Coin Communications Company, is authorized to provide private pay telephone service in Missouri.

28. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 28 of the Complaint that HKH Management Services, Inc. (HKH) is a Missouri corporation in good standing and is authorized to provide private pay telephone service in Missouri.

29. AT&T Missouri admits that Complainants Evercom Systems, Inc.; Illinois Payphone Systems, Inc.; Midwest Communication Solutions, Inc.; and Missouri Telephone & Telegraph are AT&T Missouri customers. AT&T Missouri denies the remaining allegations contained in paragraph 29.

30. AT&T Missouri opposes and denies that Complainants have the right to request a waiver of the 4 CSR 240-2.070(4)(A) requirement that their formal complaint contain the "signature of each complainant" and the "name and street address of each complainant and, if different, the address where the subject utility service was rendered." The requirement that the Complaint be signed by each complainant is a statutory requirement, which this Commission has no authority to waive. *See* Section 386.390(1), RSMo (2000). Moreover, the Commission will need this information to determine whether the Complaint, on its face, is properly perfected. Section 386.390(1), RSMo (2000) and 4 CSR 240-2.070(5) require the complaint to be signed by "not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of . . . telephone service." The requirement that each complainant sign the complaint and provide the address where service was taken will be needed by the Commission to make the determination of whether a complainant is a purchaser or prospective purchaser of the service.

AT&T Missouri also denies that compliance with these requirements would be overly burdensome, either for Complainants or the record. Complainants have had 16 years to sign the complaint and provide service location information. And to the best of AT&T Missouri's

knowledge, information and belief, Complainants' representation that service locations "could approach several thousand separate locations" is grossly overstated. To the extent location data is proprietary, the Commission's "Confidential Information" rules provide adequate protection. *See* 4 CSR 240-2.135(2).

31. AT&T Missouri[24] admits that it is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo. AT&T Missouri admits that it provides local exchange telecommunications service to payphone service providers in Missouri. AT&T Missouri denies that it provides payphone service in competition with Complainants or that it is a noncompetitive telecommunications company. AT&T Missouri denies that the Commission has jurisdiction over Complainants' complaint. All correspondence, pleadings, orders, decisions, and communications directed to AT&T Missouri in this proceeding should be sent to:

Leo J. Bub
Robert J. Gryzmala
Attorneys for Southwestern Bell Telephone Company
d/b/a AT&T Missouri
909 Chestnut Street, Room 3518
St. Louis, Missouri 63101

32. AT&T Missouri is without sufficient information to admit or deny the allegations contained in paragraph 32 of the Complaint.

33. AT&T Missouri states that the Missouri statute referenced in paragraph 33 of the Complaint speaks for itself and no response is necessary.

[24] A copy of Southwestern Bell Telephone Company's registration of the fictitious name "AT&T Missouri" was filed with the Commission on July 17, 2007, in Case No. TO-2002-185. The company has since been converted into a Delaware corporation. *See*, Certificate of Conversion from the Missouri Secretary of State, dated October 3, 2012 (which was filed with the Commission on December 4, 2012 in Case No. IO-2013-0323).

The FCC and Payphone Orders

34. AT&T denies the allegations contained in paragraphs 34-42 of the Complaint. To the extent Complainants attempt to paraphrase or quote FCC orders, orders of the Missouri Commission or public filings made with the FCC, AT&T Missouri states that the referenced orders or filings speak for themselves and no response is necessary.

SWBT's Payphone Rates

35. AT&T Missouri admits that its tariff rates being challenged by Complainants were approved by the Commission in Case No. TT-97-345 and that those tariffs are currently on file with the Commission and speak for themselves. AT&T Missouri denies the remaining allegations contained in paragraphs 43-55 of the Complaint. To the extent Complainants attempt to paraphrase or quote FCC orders, orders of the Missouri Commission or public filings made with the FCC, AT&T Missouri states that the referenced orders or filings speak for themselves and no response is necessary.

36. To the extent that AT&T Missouri has neither specifically admitted nor denied any allegations contained in the Complaint, AT&T Missouri specifically denies those allegations.

AFFIRMATIVE DEFENSES

1. Complainants fail to state a claim upon which relief can be granted.

2. Complainants' claims are barred by laches, waiver, estoppel, and failure to mitigate.

3. Complainants' Complaint is barred by *res judicata*, collateral estoppel, and the law of the case.

4. Complainants' claims are barred by State law.

5. Complainants' claims are barred by applicable statutes of limitations.

6. The relief sought by Complainants is barred by the Commission's lack of authority to award damages.

7. Complainants' request for a retroactive refund constitutes unlawful and impermissible retroactive ratemaking in violation of federal and state law.

8. Complainants' request for a retroactive refund is barred by the filed rate doctrine.

9. Complainants' claims are barred because AT&T Missouri is lo longer subject to 47 U.S.C. § 276.

OPPOSITION TO REQUEST FOR WAIVER

AT&T Missouri opposes Complainants' request to waive the 4 CSR 240-2.070(4)(A) requirement that their formal complaint contain the "signature of each complainant" and the "name and street address of each complainant and, if different, the address where the subject utility service was rendered."

The requirement that the Complaint be signed by each complainant is a statutory requirement, which this Commission has no authority to waive. *See* Section 386.390(1), RSMo (2000). Moreover, the Commission will need this information to determine whether the Complaint, on its face, is properly perfected. Section 386.390(1), RSMo (2000) and 4 CSR 240-2.070(5) require the complaint to be signed by "not fewer than twenty-five (25) consumers or purchasers or prospective consumers or purchasers of . . . telephone service." The requirement that each complainant sign the complaint and provide the address where service was taken will be needed by the Commission to make the determination of whether a complainant is a purchaser or prospective purchaser of the service.

Compliance with these requirements will not be overly burdensome, either for Complainants or the record. Complainants have had 16 years to sign the complaint and provide service location information. And to the best of AT&T Missouri's knowledge, information and belief, Complainants' representation that service locations "could approach several thousand separate locations" is grossly overstated. To the extent location data is proprietary, the Commission's "Confidential Information" rules provide adequate protection. *See* 4 CSR 240-2.135(2). Accordingly, the Commission should deny Complainants' request to waive 4 CSR 240-2.070(4)(A).

WHEREFORE, having fully answered, AT&T Missouri requests the Commission to enter an Order dismissing Complainants' Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY,
D/B/A AT&T MISSOURI

BY _____

LEO J. BUB #34326
ROBERT J. GRYZMALA #32454
Attorneys for AT&T Missouri and AT&T Communications
909 Chestnut Street, Room 3518
St. Louis, Missouri 63101
314-235-2508 (Telephone)/314-247-0014(Facsimile)
leo.bub@att.com

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on April 1, 2013.

Leo J. Bub

General Counsel
Cully Dale
Missouri Public Service Commission
PO Box 360
Jefferson City, MO 65102
general.counsel@psc.mo.gov
cully.dale@psc.mo.gov

Public Counsel
Office of the Public Counsel
PO Box 7800
Jefferson City, MO 65102
opcservice@ded.mo.gov

Mark W. Comley
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 301
PO Box 537
Jefferson City, MO 65102